ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 95-116
Telephone Number Portability	)	RM 8535
	)	

PETITION FOR PARTIAL RECONSIDERATION OF AMERICAN COMMUNICATIONS SERVICES, INC.

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American Communications Services, Inc. ("ACSI"), by its attorneys, and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby petitions the FCC to reconsider certain portions of its *First Report and Order* in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

ACSI applauds the Commission's prompt adoption of rules addressing the telephone number portability provisions of the Telecommunications Act of 1996 ("1996 Act"). As the FCC recognized, number portability is essential to the development of the pro-competitive, deregulatory local exchange markets envisioned by Congress.[2] Not only did the FCC require the development of and implementation of long-term service provider portability in the top 100 markets -- and in smaller markets upon demand -- it appropriately mandated the

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[1] *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-286 61 Fed. Reg. 38,605 (July 25, 1996) ("First Report and Order").

[2] *Id.* at ¶ 2. (*citing* Senate Comm. on Commerce, Science and Transportation Rpt. on 5.652 at 19-20 (Mar. 30, 1995) and House of Rep. Comm. on Commerce Rpt. on H.R. 1555 at 72 (July 24, 1995)).

immediate introduction of interim number portability pursuant to current technically feasible methods upon specific request from another carrier.[3] In addition, the Commission adopted reasonable, competitively neutral guidelines for the states to follow in establishing regulations to allow for number portability cost recovery on an interim basis.[4]

From ACSI's perspective, the *First Report and Order*, on the whole, represents a good first step in furthering Congress' and the FCC's objectives of reducing barriers to entry associated with number portability issues and promoting local exchange services competition. ACSI submits, however, that certain refinements to the rules adopted in the *First Report and Order* are required to ensure that these important goals will in fact be realized. **First**, the FCC should require retroactive recovery of number portability costs pursuant to the guidelines articulated in the *First Report and Order*. In other words, if an incumbent local exchange carrier ("ILEC") is providing number portability *prior* to the establishment of a state-commission-approved cost recovery mechanism consistent with the Commission's guidelines, any carrier that has been contributing to the cost recovery should be entitled to a true-up and a refund of the amounts it paid the ILEC prior to the effectiveness of such recovery mechanism in excess of the amounts it would have paid had the mechanism been in effect when the carrier first received number portability. This true-up should go as far back as February 8, 1996, the date the 1996 Act became effective, or to the first date the ILEC provided number portability to the carrier, whichever is *later*.

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[3] *First Report and Order*, ¶ 114.

[4] *Id.* ¶¶ 132-36.

Second, the FCC should adopt clear guidelines that allow for acceleration of the long-term portability implementation schedule in smaller regions, where appropriate. The availability of such relief will promote competition in this critical time that will better reflect the actual business strategies of new entrants, several of which, such as ACSI, are not focusing their initial efforts upon the largest, *i.e.*, top 50, markets. A delay in the implementation of long term number portability of two or three years in smaller markets could stall or even thwart the development of full-fledged local competition in many regions, contrary to the letter and spirit of the 1996 Act.

II. STATEMENT OF INTEREST

ACSI is a publicly traded Delaware corporation, having its principal place of business in Annapolis Junction, Maryland. ACSI currently employs more than 200 persons. ACSI has almost two dozen operating subsidiaries providing or authorized to provide competitive local exchange and access services. ACSI constructed its first local network in October 1994 in Louisville, Kentucky, and currently has 18 operational local fiber optic networks, concentrating in mid-size markets in the South and Southwest. In addition, ACSI has networks under construction in 6 other locations. ACSI plans to have a total of over 30 local networks constructed by mid-1997 and to construct its fiftieth local network by mid-1998. ACSI will begin providing switched services in Tier 2 and Tier 3 markets in the fourth quarter of this year. An important component of ACSI's success in the local exchange marketplace will be the availability of number portability at a reasonable cost. Without number portability, a significant fraction of the potential customers of ACSI, *i.e.* current

customers of the ILEC, are unlikely to switch to ACSI for that reason. If the cost of number portability is unreasonable, then ACSI will be at an appreciable competitive disadvantage relative to the ILEC. Accordingly, ACSI has a vital interest in ensuring that, in effect, from the day it first receives number portability, it contributes to the ILEC's costs at competitively neutral rates consistent with the FCC's recently adopted guidelines.

In addition, until long-term number portability is made available in a timely fashion to the markets ACSI will shortly begin serving, ACSI will be unable to achieve true competitive parity because of the deficiencies of interim number portability methods, such as longer call set up times, ILEC access to its proprietary information, increased potential for call blocking, poorer transmission quality, and possible loss of CLASS features and other services. Of the eighteen markets in which ACSI has constructed networks, only five under the schedule adopted in the *First Report and Order* are required to have long-term number portability implemented before the last three months of 1998. Moreover, only *two* of these markets are slated to have number portability implemented by mid-1998.[5] The public interest would be served if ACSI, and other new competitors with analogous business strategies, and end users in the markets in which these new entrants will operate, will have number portability available to them on a more appropriate and timely basis. ACSI thus has a vital interest in raising issues related to the flexibility of the number portability implementation schedule in order to promote expeditiously local exchange competition in those markets where ACSI and other new entrants have commenced or will soon commence operations.

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[5] Indeed, as noted above, by that time, ACSI plans to have at least 50 operational networks.

III. THE FCC'S COST RECOVERY GUIDELINES SHOULD APPLY RETROACTIVELY

The *First Report and Order* made clear that ILECs must provide currently available number portability as soon as reasonably possible upon receipt of a specific request from a competing local exchange carrier.[6] In connection with this mandate, the Commission adopted general competitively neutral cost recovery principles for currently available number portability that satisfy the 1996 Act's standards.[7] Applying these principles, the state commissions are responsible for mandating specific cost-recovery mechanisms for currently available number portability.[8]

Pursuant to state commission initiatives, a number of ILECs are already providing number portability according to currently available methods, as the *First Report and Order* observes.[9] Other ILECs have agreed, as part of Section 251 interconnection negotiations, to provide number portability to requesting carriers. For example, BellSouth has agreed with ACSI to implement number portability in eight states within its operating territory, only some of which currently have state-mandated interim number portability requirements.

In each of these situations, the charges paid by new entrants to the ILECs were set prior to, and therefore without reference to, the cost recovery guidelines mandated in the

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[6] *First Report and Order*, ¶ 114. While the directive applies to all local exchange carriers, the Commission recognized that, for practical purposes, the ILECs, for at least the immediate future, will bear the burden of implementing number portability. *Id.* ¶ 122. *See also* 47 U.S.C. § 251(b)(2).

[7] *First Report and Order*, ¶ 121. *See* 47 U.S.C. § 251(e)(2).

[8] *First Report and Order*, ¶ 127.

[9] *See, e.g., id.*, ¶¶ 23-25.

First Report and Order. However, the statutory cost recovery provisions that these guidelines are intended to implement were mandated by the 1996 Act and effective as of February 8, 1996. In other words, the recovery of costs for number portability on a competitively neutral basis has been subject to Section 251(e)(2) of the Communication Act, as added by the 1996 Act, since that date.

Once a state commission adopts a specific cost recovery mechanism for interim number portability, as the *First Report and Order* requires, it may become apparent that one or more new entrants prior to that time have been contributing to the recovery of the ILEC's number portability costs at a rate exceeding that to which they are obligated under the new cost recovery mechanism. Where this occurs, it means that, contrary to the requirement of competitively-neutral cost recovery in Section 251(e)(2), the ILEC has been over-recovering its costs from the new entrants affected, giving it an incremental cost advantage over its competitors. This is a *per se* violation of the FCC's recently adopted cost recovery principles.[10] In such a situation, local competition will have been hampered, to the detriment of the new entrants as well as the public.

In order to anticipate and rectify those cases where such over-recovery of ILEC number portability costs from competitors takes place, the FCC should modify the number portability rules to require a true-up of amounts paid from either (a) February 8, 1996, or (b) the date number portability was first provided to the new entrant, whichever is *later*, through the date the state-approved cost recovery mechanism required by the *First Report and Order*

[10] *Id.* ¶ 132 ("the recovery mechanism should not have a disparate effort on the incremental costs of competing carriers seeking to serve the same customer").

becomes effective. New entrants should be entitled to receive from the ILEC the difference between the amounts actually paid and what would have been paid under the Section 251(e)(2) cost recovery mechanism. While such retroactive reimbursement of excessive payments cannot make up for the lost business attributable to the new entrants' higher costs (which, presumably required the new entrant to charge more for its services),[11] it is an appropriate step to allow competition, in some measure, to "catch up." Moreover, without a true-up requirement, the purpose of the interim cost recovery guidelines could be completely defeated as neutral cost recovery mechanisms may not be established in many cases for six months to a year from now.

IV. THE SCHEDULE FOR THE IMPLEMENTATION OF LONG-TERM NUMBER PORTABILITY SHOULD BE REWRITTEN TO ACCOMMODATE COMPETITIVE REALITIES AND REMOVE ANY PREJUDICE AGAINST SMALLER MARKETS

In the *First Report and Order*, the FCC recognized the unsuitability of currently available number portability methods as a long-term fulfillment of Congress' Section 251(b)(2) mandate. As the FCC noted, currently available methods, while useful, do not fully support true competition because would-be new customers of the ILECs' competitors desiring to keep their telephone numbers may face longer call set-up times, increased call blocking, poorer transmission quality, and loss of services supported by CLASS features, such as Caller ID.

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[11] *Accord id.* ¶ 132.

Accordingly, the Commission required the LECs operating in the 100 largest metropolitan statistical areas ("MSAs") to begin offering long-term service provider number portability between October 1, 1997, and December 31, 1998, according to a phased-in deployment schedule. Pursuant to this schedule, long-term portability will be implemented in the most populous markets first. After December 31, 1998, carriers may request and the LEC must make available long-term portability in markets below the top 100. However, such requests need not be recognized until January 1, 1999, and need not be honored, at the earliest, until six months after a specific request is made, *i.e.*, July 1, 1999 (*three* years from now), or later, depending on when number portability is requested.[12]

Unfortunately, the deployment schedule in the *First Report and Order* presupposes a generic business strategy by all new entrants, namely construction of networks in the largest markets first. While individual telecommunications providers may be adopting that approach, and certainly are entitled to do so, not all new entrants have chosen this path. ACSI, for example, has targeted principally mid-level and smaller (*i.e.*, Tier 2 and Tier 3) markets in the South and Southwest to build out its initial networks, and over the next two years will build 30 more. As noted above, ACSI has already constructed almost twenty networks. Moreover, ACSI has concluded interconnection negotiations with BellSouth, Southwestern Bell, and US West that will enable ACSI soon to enter the local exchange marketplace in cities in twelve states.[13] ACSI already has authority to provide switched

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[12] *Id.*, ¶ 80.

[13] ACSI has requested arbitration in twelve states to resolve some unbundled element pricing issues and, in a few of the states, issues related to interconnection with third-party (continued...)

local exchange services in seven of the twelve states for which it has negotiated interconnection agreements.

Despite ACSI's aggressive business plan, which is proceeding on schedule, it will be hampered by the unavailability of long-term number portability in the overwhelming majority of its chosen markets for two to three years at a minimum.[14] Specifically, according to the FCC's deployment schedule, long-term portability will be available before July 1998 in only two of the first eighteen markets in which ACSI has constructed networks. Fifteen of ACSI's markets are not scheduled to have long-term number portability before October 1998. Seven of these markets, being out of the top 100 MSAs, are unlikely to be served with long-term portability before mid-1999, three years from now.

Given that ACSI is poised to offer local exchange services in these nearly twenty markets in the near future, the timely and geographically neutral deployment of long-term number portability is crucial to the introduction of full-fledged competition. Accordingly, ACSI submits that the schedule in Appendix F the *First Report and Order* be accelerated[15]

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[13](...continued)
collocated carriers (albeit this issue was resolved in the FCC's recent interconnection order in Docket 96-98 in ACSI's favor) and reciprocal compensation for mutual traffic exchange.

[14] In the *First Report and Order*, the FCC delegated authority to the Common Carrier Bureau to move the schedule back for a given market upon proper showing by an ILEC. *Id.*, ¶ 85. As a practical matter, the extension of time for a given market would seem to increase the likelihood that some or all MSAs further down on the list for a given ILEC will be delayed as well.

[15] ACSI's proposed schedule changes are in Attachment A hereto.

such that all major, *i.e.*, RBOC, regions be required to introduce long-term number portability according to roughly the same schedule as a function of population served.[16]

Those markets in the top 100 served by non-RBOC ILECs (*e.g.*, Cincinnati and Las Vegas) should also be accelerated. Long-term number portability in the largest market of each such ILEC should be deployed in the fourth quarter of 1997, as that is the first period in which the RBOCs must begin to implement long-term number portability. At a minimum, these ILECs should be required to deploy their first market no later than the first calendar quarter of 1998.[17]

In addition, as a general matter, *bona fide* requests for MSAs below the top 100 markets should be accepted beginning July 1, 1998, not January 1, 1999. In this way, implementation of *bona fide* requests will begin upon the completion of the top 100 markets rather than six months later.[18]

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[16] In the Southwestern Bell region, ACSI has moved up Ft. Worth to be implemented simultaneously with Dallas because of the importance to new entrants to be able to provide service throughout the Dallas-Ft. Worth metroplex area in order to compete effectively with Southwestern Bell.

[17] Thus, the timetable for Las Vegas, Honolulu, Tulsa, Rochester, Hartford, and New Haven would be advanced by at least one to two calendar quarters. *See* Attachment A.

[18] In the case of the regions currently served by NYNEX, Southwestern Bell, and US West, *bona fide* requests should be permitted beginning April 1, 1998, since under ACSI's proposed changes they would complete implementation of the markets in the top 100 they serve by September 1998. In addition, *bona fide* requests for markets served by a non-RBOC ILEC should be acceptable six months prior to the scheduled implementation of the final market in the top 100 served by that ILEC. *E.g.*, GTE must begin accepting *bona fide* requests on January 1, 1997, six months prior to the implementation deadline for Tulsa, Oklahoma.

Because ACSI expects to need number portability in order to support prospective customers in its first 20 markets prior to the first deployment date of October 1, 1997, the requested modification to the deployment schedule would serve the public interest by accelerating equality among competitors and further the FCC's objectives in this proceeding. Moreover, such a modification would better reflect the realities of the marketplace, in that a number of new competitors are concentrating on markets below the top 50. The existing schedule, on the other hand, presupposes that the largest markets will experience competition before smaller markets[19] and, in effect, raises an entry to barrier in smaller markets. While in the absence of hard evidence such an assumption might be warranted, the facts speak to the contrary. ACSI, for example, will introduce competition in many of the lower half of the top 100 markets, *i.e.*, markets 51-100, beginning in the next few months, well before long-term number portability is scheduled for deployment.

Further, the modifications proposed by ACSI are consistent with the letter and spirit of the 1996 Act, which is designed to promote competition and the availability of telecommunications services in all markets, not favoring the larger over the smaller.[20] For example, Section 254(b)(3) states that:

> Consumers *in all regions of the Nation*, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas and that are available at

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[19] *See, e.g., id.*, ¶ 81. ("Our phased deployment schedule takes in account the differing levels of local exchange competition that are likely to emerge in the geographic areas throughout the country.")

[20] *See, e.g.*, 47 U.S.C. § 254 (universal service, rate integration, geographic averaging).

> rates that are reasonably comparable to rates charges for similar services in urban areas.[21]

ACSI's suggested schedule requires all of the RBOCs to implement number portability at an approximately equal pace and thus minimizes the discrepancies between one region and another in terms of introducing long-term number portability. Accordingly, ACSI's proposed modifications would serve the public interest and are necessary to conform the *First Report and Order* to the 1996 Act.

In the alternative, the Commission should amend its rules to permit carriers with operational networks in the top 100 MSAs and authority to provide local exchange services to request long-term number portability from the appropriate ILEC on or after July 1, 1997. Such requests should specifically identify the geographic area within one or more of top 100 markets covered by the request and a date six or more months in the future when the new entrant requires long-term portability.[22] In the event the ILEC serving the geographic area believes that it will be unable to provide long-term number portability on the date requested, the ILEC will have the burden of proving -- through substantial, credible evidence -- the technical basis for its contention that it cannot do so. The ILEC will have to propose an alternative date for deployment not more than three months later than the date identified by the requesting carrier.

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[21] 47 U.S.C. § 254(b)(3) (emphasis added).

[22] In addition, carriers with operational networks in markets below the top 100 MSAs permitted to make a *bona fide* request for long-term number portability in such markets after January 1, 1998.

V. CONCLUSION

For the foregoing reasons, the Commission should grant ACSI's Petition for Partial Reconsideration and require a true-up of amounts paid by new entrants to ILECs for currently available number portability from the effective date of the 1996 Act or the date number portability was first taken through the date the state-approved cost-recovery mechanism goes into effect. In addition, the FCC should accelerate the long-term service provider number portability deployment dates for the top 100 markets, as suggested in Attachment A. In the alternative, ACSI requests that, beginning July 1, 1997, carriers be able to make *bona fide* requests for long-term portability at least six months in advance of when portability is needed. The ILECs involved should be required to honor the request unless it proves with substantial evidence that it is technically unable to do so. The modifications ACSI proposes herein will promote the public-interest in ensuring the entry of new local competitors and increasing the service choices of consumers at lower prices.

Respectfully submitted,

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ACSI's PROPOSED REVISIONS TO
APPENDIX F - IMPLEMENTATION SCHEDULE

Implementation must be completed by the carriers in the relevant MSAs during the periods specified below. The number in parentheses reflects the total population of the MSAs scheduled for implementation in each quarter.

10/97-12/97		1/98-3/98		4/98-6/98		7/98-9/98		10/98-12/98	
Chicago, IL	3	Detroit, MI	6	Indianapolis, IN	34	Grand Rapids, MI	56	Youngstown, OH	85
		Akron, OH	20	Milwaukee, WI	35	Dayton, OH	61	Ann Arbor, MI	95
				Columbus, OH	38	Cleveland, OH	73	Ft. Wayne, IN	100
						Gary, IN	80		
						Toledo, OH	81		
(7,668,000)		(6,529,000)		(4,341,000)		(3,852,000)		(1,588,000)	
Philadelphia, PA	4	Washington, DC	5	Pittsburgh, PA	19	Bergen, NJ	42	Scranton, PA	78
		Baltimore, MD	18	Newark, NJ	25	Middlesex, NJ	52	Allentown, PA	82
				Norfolk, VA	32	Monmouth, NJ	54	Harrisburg, PA	83
						Richmond, VA	63	Jersey City, NJ	88
								Wilmington, DE	89
(4,949,000)		(6,932,000)		(5,865,000)		(4,325,000)		(3,004,000)	
Atlanta, GA	8	Miami, FL	24	Charlotte, NC	43	Jacksonville, FL	58	Knoxville, TN	79
		Ft. Lauderdale, FL	39	Greensboro, NC	48	Raleigh, NC	59	Baton Rouge, LA	87
		Orlando, FL	40	Nashville, TN	51	West Palm Bch, FL	62	Charleston, SC	92
		New Orleans, LA	41	Memphis, TN	53	Birmingham, AL	66	Sarasota, FL	93
				Louisville, KY	57	Greensville, SC	67	Mobile, AL	96
								Columbia, SC	98
(3,331,000)		(6,078,000)		(5,474,000)		(4,601,000)		(3,227,000)	
Las Vegas, NV	50	*Bona fide* requests accepted by Sprint/Central as of July 1, 1997; implementation of requests begins as early as January 1, 1998.							
(1,076,000)									
Cincinnati, OH	30								
(1,581,000)									
Tampa, FL	23	Honolulu, HI	65	Tulsa, OK	70	*Bona fide* requests accepted by GTE as of January 1, 1998; implementation of requests begins as early as July 1, 1998.			
(2,157,000)		(874,000)		(743,000)					

Attachment A

10/97-12/97	1/98-3/98	4/98-6/98	7/98-9/98	10/98-12/98
New York, NY 2 (8,584,000)	Boston, MA 9 (3,211,000)	Nassau, NY 13 Buffalo, NY 44 Providence, RI 47 (4,971,000)	Albany, NY 64 Syracuse, NY 69 Springfield, MA 86 (2,213,000)	*Bona fide* requests accepted by NYNEX as of April 1, 1998; implementation of requests begins as early as October 1, 1998.
Los Angeles, CA 1 (9,150,000)	Riverside, CA 10 San Diego, CA 14 (5,528,000)	Orange Co., CA 15 Oakland, CA 21 San Francisco, CA 29 (6,371,000)	San Jose, CA 31 Sacramento, CA 36 Fresno, CA 68 (3,833,000)	Ventura, CA 72 Bakersfield, CA 84 Stockton, CA 94 Vallejo, CA 99 (2,313,000)
Rochester, NY 49 (1,090,000)				
Houston, TX 7 (3,653,000)	Dallas/Ft. Worth, TX 11/33 St. Louis, MO 16 (6,898,000)	Kansas City, KS 28 San Antonio, TX 37 Oklahoma City, OK 55 Austin, TX 60 (5,055,000)	El Paso, TX 74 Little Rock, AR 90 Wichita, KS 97 (1,710,000)	*Bona fide* requests accepted by Southwestern Bell as of April 1, 1998; implementation of requests begins as early as October 1, 1998.
Hartford, CT 46 (1,156,000)	New Haven, CT 91 (527,000)	*Bona fide* requests accepted by SNET as of October 1, 1997; implementation of requests begins as early as April 1, 1998.		
Minneapolis, MN 12 (2,688,000)	Phoenix, AZ 17 Seattle, WA 22 Denver, CO 26 (6,449,000)	Portland, OR 27 Salt Lake City, UT 45 Tucson, AZ 71 Omaha, NE 75 Albuquerque, NM 76 (4,895,000)	Tacoma, WA 77 (638,000)	*Bona fide* requests accepted by US West as of April 1, 1998; implementation of requests begins as early as October 1, 1998.